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**UNITED STATES DISTRICT COURT**  
**NORTHERN DISTRICT OF CALIFORNIA**  
**OAKLAND DIVISION**

FINJAN, INC., a Delaware Corporation,  
  
 Plaintiff,  
  
 v.  
  
 FIREEYE, INC., a Delaware Corporation,  
  
 Defendant.

Case No.: 13-CV-03133-SBA

**JOINT CASE MANAGEMENT  
 STATEMENT & [PROPOSED] ORDER**

Date: October 10, 2013  
 Time: 2:30 p.m.  
 Via telephone

Date Filed: September 30, 2013  
 Trial Date: None Set

Pursuant to Federal Rule of Civil Procedure 26(f), Civil Local Rule 16-9, Patent Local Rule 2-1, the Standing Order for All Judges of the Northern District of California – Contents of Joint Case Management Statement, Judge Armstrong’s Standing Orders – Other Requirements (Section A), the Court’s July 8, 2013 Order Setting Initial Case Management Conference And ADR Deadlines (Dkt. No. 2), and the July 11, 2013 Clerk’s Notice (Dkt. No. 7), the parties to the above-titled action, Plaintiff Finjan, Inc. (“Finjan”) and Defendant FireEye, Inc. (“FireEye”), jointly submit this Case Management Statement and Proposed Order.

### **1. Jurisdiction and Service**

This is an action for patent infringement arising under 35 U.S.C. § 101 *et seq.* The Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. §§ 1331, 1338(a), 2201 and 2202.

Venue is proper in this Court pursuant to 28 U.S.C. §§ 1391(b) and (c) and/or 1400(b). No issues exist regarding personal jurisdiction, venue or service.

### **2. Facts**

Finjan filed its original complaint in this action on July 8, 2013, and subsequently filed a first amended complaint on August 16, 2013 (Dkt No. 11) pursuant to Rule 15(a)(1). Finjan alleges that FireEye directly infringes U.S. Patent No. 6,804,780 (“the ‘780 Patent”), U.S. Patent No. 8,079,086 (“the ‘086 Patent”), U.S. Patent No. 7,975,305 (“the ‘305 Patent”), U.S. Patent No. 8,225,408 (“the ‘408 Patent”), U.S. Patent No. 7,058,822 (“the ‘822 Patent”), U.S. Patent No. 7,647,633 (“the ‘633 Patent”) and U.S. Patent No. 6,154,844 (“the ‘844 Patent”) (collectively “the Patents-in-Suit”) by making, using, selling, offering for sale and/or importing technologies in connection with the FireEye Threat Protection Platform. Finjan additionally alleges that FireEye induces infringement of each of the Patents-in-Suit by instructing, directing and/or requiring others to perform all or some of the steps of method claims of the Patents-in-Suit. Finjan contends it holds all rights, title, and interest in the

1 Patents-in-Suit. Finjan seeks damages and injunctive relief for the alleged infringement, as well as a  
 2 finding that this case is exceptional.

3 FireEye filed its answer to Finjan's first amended complaint on September 3, 2013 (Dkt No.  
 4 13) (pursuant to the parties' stipulated extension of time (Dkt. No. 9)). FireEye denies both direct and  
 5 indirect infringement of the Patents-in Suit and asserts affirmative defenses of failure to state a claim,  
 6 non-infringement, invalidity, estoppel, limitation on damages, no right to injunctive relief, and barring  
 7 of relief pursuant to 28 U.S.C. § 1498. FireEye further asserts counterclaims seeking declarations of  
 8 non-infringement and invalidity of the Patents-in-Suit. FireEye also seeks a finding that this case is  
 9 exceptional.  
 10

### 11 **3. Legal Issues**

12 The principal disputed legal issues are:

- 13 • The proper construction of any disputed claim terms;
- 14 • Whether FireEye infringes any or all of the Patents-in-Suit, either directly (35 U.S.C. §  
 15 271(a)) or indirectly (35 U.S.C. § 271(b));
- 16 • Whether the Patents-in-Suit are invalid (35 U.S.C. §§ 101, 102, 103, 112);
- 17 • Whether Finjan's claims are barred, in whole or in part, by the various equitable and legal  
 18 defenses raised by FireEye;
- 19 • Whether Finjan is entitled to damages as a result of the alleged infringement of any or all of  
 20 the Patents-in-Suit, and if so, the amount (35 U.S.C. § 284);
- 21 • Whether Finjan is entitled to injunctive relief to prevent irreparable harm as a result of the  
 22 alleged continuing infringement of any or all of the Patents-in-Suit (35 U.S.C. § 283);
- 23 • Whether this case is exceptional (35 U.S.C. § 285).

### 24 **4. Motions and/or Pending Matters**

#### 25 (a) Pending Motions

26 There are no pending motions before the Court.  
 27

## (b) Anticipated Motions

Finjan anticipates moving for summary judgment and may file other dispositive and non-dispositive motions as appropriate as the case progresses.

FireEye anticipates the following motions:

- **Administrative Motion to Consider Whether the Cases Should Be Related.** Finjan filed a patent infringement case in this District against Blue Coat Systems, Inc. (“Blue Coat”), *Finjan v. Blue Coat Systems, Inc.*, 13-cv-3999, on August 28, 2014, alleging that Blue Coat infringes four of the seven patents asserted against FireEye in the instant lawsuit. Finjan filed another patent infringement case in this District against Websense, Inc. (“Websense”) on September 23, 2013, *Finjan v. Websense, Inc.*, 13-cv-4398, alleging that Websense infringes three of the seven patents asserted against FireEye in the instant lawsuit. FireEye is currently preparing an Administrative Motion to Consider Whether the Cases Should Be Related.
- **Motion to Stay.** FireEye currently is in the process of preparing petitions for reexamination of the patents-in-suit. FireEye anticipates filing a motion to stay the case pending the outcome of the reexaminations proceedings.
- **Motions for Summary Judgment.** FireEye anticipates moving for summary judgment and may file other dispositive and non-dispositive motions as appropriate as the case progresses.

## 5. Amendment of Pleadings, Addition of Parties, Etc.

The parties agree that the deadline for joining parties and amending the pleadings without leave of Court should be November 11, 2013. The parties agree that they may amend the pleadings upon a showing of good cause after this deadline has passed.

## 6. Evidence Preservation

The parties have reviewed the Northern District of California's Guidelines For the Discovery of Electronically Stored Information ("ESI") and Checklist for Rule 26(f) Meet and Confer Regarding ESI, including those portions related to evidence preservation. Additionally, the parties have met and conferred at their Rule 26(f) conference regarding evidence preservation. Each party has implemented a litigation hold with respect to all ESI and hardcopy documents and media identified as relevant to this action.

## **7. Initial Disclosures**

Finjan proposes that the parties exchange initial disclosures pursuant to Rule 26(a) on October 10, 2013, to accommodate FireEye's request to extend this deadline from the original deadline of October 3, 2013. FireEye proposes that the parties exchange initial disclosures pursuant to Rule 26(a) on October 24, 2013.

## **8. Discovery**

The parties met and conferred pursuant to Rule 26(f) on September 17, 2013. Finjan served FireEye with document requests and interrogatories following the conference on September 17, 2013.

Pursuant to Rule 26(f) and paragraph 8 of the Standing Order for All Judges of the Northern District of California – Contents of Joint Case Management Statement, the parties propose the following discovery plan:

- (a) Changes to the timing, form, or requirement for disclosures under Rule 26(a), including a statement of when initial disclosures were made or will be made.

Finjan proposes that the parties exchange initial disclosures pursuant to Rule 26(a) on October 10, 2013, to accommodate FireEye's request to extend this deadline from the original deadline of October 3, 2013. FireEye proposes that the parties exchange initial disclosures pursuant to Rule 26(a) on October 24, 2013. The parties' proposals regarding the timing for expert disclosures under Rule 26(a)(2) and pretrial disclosures under Rule 26(a)(3) are set forth in the proposed schedule in Section

17 (Appendix A) below.

- (b) Subjects on which discovery may be needed, when discovery should be completed, and whether discovery should be conducted in phases or be limited to or focused on particular issues.

The parties anticipate that the scope of discovery will encompass the factual and legal issues identified in Sections 2 and 3 above, and the requested relief discussed in Section 11 below, including all related, ancillary, and subsidiary factual and legal issues and matters. The parties' proposals regarding when discovery should be completed are set forth in the proposed schedule in Section 17 (Appendix A) below.

- (c) Any issues about disclosure or discovery of electronically stored information, including the form or forms in which it should be produced.

The parties discussed discovery of ESI during their Rule 26(f) conference and agreed to file a Stipulated Order Regarding Discovery of ESI by October 24, 2013 to address discovery of ESI, including particular topics set forth in the Northern District of California's Guidelines For the Discovery of ESI and Checklist for Rule 26(f) Meet and Confer Regarding ESI. The parties will continue to meet and confer in good faith to reach agreement on the terms of the stipulation and will advise the Court if they are unable to resolve any disputed issues.

With respect to production format, the parties agree that documents will be produced in single-page TIFF format with full-text extraction and Concordance load files. If there is no extractable text, the producing party shall perform Optical Character Recognition ("OCR") on the document and provide the associated text file. All text files should be produced as document level text files with a path to the text file included in the Concordance load file; extracted text/OCR should not be embedded in the load file itself. If it is impracticable to produce a document in TIFF format, the producing party has the option of producing such document in native format. To the extent a receiving party identifies Excel files or other files from the TIFF production set for which data manipulation or analysis may be

necessary, the parties agree to meet and confer in good faith to coordinate possible supplemental production of the native version of those files. Regarding the production of email, the parties agree to proceed with discovery of email pursuant to the Federal Circuit Advisory Council's Model Order Regarding E-Discovery in Patent Cases with the minor modification to this order. Finjan proposes that each party will agree to limit the email production requests to seven (7) custodians (rather than five (5)) per producing party. (Model Order, Paragraphs 10 - 11, [http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery\\_Model\\_Order.pdf](http://www.cafc.uscourts.gov/images/stories/announcements/Ediscovery_Model_Order.pdf).) FireEye proposes that the parties agree to meet and confer in good faith if modifications to paragraphs 10 and 11 of the Model Order become necessary in the future.

Further agreement regarding discovery of ESI will be addressed in the parties' Stipulated Order Regarding Discovery of ESI.

- (d) Any issues about claims of privilege or of protection as trial-preparation materials, including — if the parties agree on a procedure to assert these claims after production — whether to ask the court to include their agreement in an order.

The parties agree that neither party will produce nor list on any privilege log any item protected by any privilege, immunity, or protection that occurred or was/is created on or after the filing date of this litigation. Subject to the foregoing, the parties agree that issues of privilege or work product shall be addressed as provided in the Federal Rules of Civil Procedure, Federal Rule of Evidence 502 and in the protective order and/or Stipulated Order Regarding Discovery of ESI to be entered in this action.

- (e) Changes that should be made in the limitations on discovery imposed under these rules or by local rule, and what other limitations should be imposed.

To the extent not limited below, and unless otherwise agreed to by the parties, the parties agree that discovery is subject to the limitations set forth in the Federal Rules of Civil Procedure and Local Rules of this Court. If a party requests discovery that exceeds any of the limitations set forth below,

the parties agree to meet and confer in good faith to attempt to resolve the issue without intervention of the Court. If the parties are unable to reach agreement, a party may seek leave from the Court for the additional discovery.

(i) Requests for Production of Documents and Things

The parties agree that may serve up to 300 requests for production of documents and things.

(ii) Interrogatories

The parties agree that interrogatories be subject to the limits contained in the Federal Rules of Civil Procedure and the Local Rules of this Court.

(iii) Request for Admissions

The parties agree that they may serve up to 50 requests for admission on one another. Requests for admission related to the authentication of documents are exempt from this limitation.

(iv) Depositions

***Fact Depositions:***

Finjan's Proposal: Finjan and FireEye are each limited to 105 hours of deposition time for fact depositions, including individual and Rule 30(b)(6) depositions of the other party as well as third party depositions. Expert depositions will not count towards these limits. FireEye's proposal of 170 hours of total fact deposition time is well beyond the deposition limits set forth in the Federal Rules of Civil Procedure and is unduly prejudicial to Finjan. On the one hand, FireEye is attempting to unduly limit Finjan's ability to take discovery of FireEye. At the same time, FireEye's proposal permits FireEye to take extensive third party discovery, subjecting Finjan's former employees to excessive unjustified depositions. Finjan's proposed time limit permits both sides to take an equal amount of discovery and grants reasonable and ample amount of time to take all the fact depositions in the case. Moreover, Finjan's proposal of giving both parties a single total amount of time for all fact depositions provides the flexibility to both allow Finjan sufficient time to take key depositions of the various relevant



1 FireEye employees and Rule 30(b)(6) depositions of FireEye, while allowing FireEye ample time to  
2 take third party depositions of inventors and former Finjan employees.

3 FireEye's Proposal: Finjan and FireEye are each limited to 70 hours of deposition time from  
4 one another for individual and Rule 30(b)(6) depositions. Finjan and FireEye are each limited to 100  
5 hours of deposition time for third party depositions. Expert depositions will not count towards these  
6 limits. Under the circumstances of this case, Finjan's proposal to lump together the limitations on  
7 hours for third party depositions along with the limitations on party depositions is unreasonable.  
8 Finjan has asserted seven patents in this case, which have ten different named inventors. Furthermore,  
9 Finjan is now a non-practicing entity, and thus, as Finjan admits above, many of Finjan's former  
10 employees will need to be deposed as third parties. Additionally, FireEye anticipates taking numerous  
11 third-party prior art depositions relating to the seven patents-in-suit. Thus, FireEye's proposal of 100  
12 hours of third party depositions, if anything, is low given the number of patents-in-suit, the number of  
13 named inventors and the number of likely third party prior art deponents. On the other hand, Finjan's  
14 proposal is unnecessarily burdensome as it would subject FireEye's employees to 105 hours of  
15 deposition. FireEye's proposal of 70 hours for party depositions is more than sufficient to allow  
16 Finjan to take discovery of FireEye.  
17  
18

19 The parties agree that individual depositions are limited to 7 hours of deposition time. While  
20 the 7 hour per witness limit does not apply to Rule 30(b)(6) witnesses, each deposition day will be  
21 limited to 7 hours. Individual depositions requiring an interpreter are limited to 14 hours of deposition  
22 time and will be conducted on two consecutive days. Individual and Rule 30(b)(6) depositions  
23 requiring an interpreter count as half time against the deposition limit.  
24

25 ***Expert Depositions:***  
26  
27  
28

1 The parties agree that an expert witness may be deposed for up to 7 hours for each issue (e.g.,  
2 infringement, invalidity) on which that expert has provided an opinion. Thus, if an expert provides an  
3 opinion regarding infringement as well as an opinion regarding invalidity, then that expert may be  
4 deposed for up to 7 hours regarding infringement and for up to 7 hours regarding invalidity, for a  
5 maximum total of 14 hours of deposition time.

6 (f) Protective Order

7 The parties will be producing confidential information requiring entry of a protective order in  
8 this action. The parties are in the process of negotiating the terms of a stipulated protective order  
9 based on the Northern District of California model protective order for litigation involving patents.  
10 Finjan proposes that the parties file the protective order (with competing proposals, if necessary) by  
11 October 24, 2013. FireEye proposes that the parties file the protective order (with competing  
12 proposals, if necessary) by January 28, 2013. Any confidential information produced prior to entry of  
13 a protective order will be subject to the Northern District of California model protective order for  
14 litigation involving patents (pursuant to Patent Local Rule 2-2).

15 (g) Discovery from Experts

16 The parties agree that the Federal Rules of Civil Procedure (e.g., Rule 26(b)(4)) and the Local  
17 Rules of this Court govern discovery from experts in this case.

18 (h) Service

19 The parties agree that service via email constitutes personal service pursuant to Rule  
20 5(b)(2)(E). Documents served on a party shall be emailed to all attorneys of record for that party.

21 **9. Class Actions**

22 Not applicable.

23 **10. Related Pending Cases**

24 On August 28, 2013, Finjan filed a lawsuit against Blue Coat Systems, Inc. ("Blue Coat") in

1 this district (Case No. 4:13-cv-03999), alleging that Blue Coat infringes four of the seven patents  
2 asserted against FireEye in the instant lawsuit, *i.e.*, the '780 Patent, the '822 Patent, the '633 Patent  
3 and the '844 Patent, along with two additional patents, *i.e.*, U.S. Patent No. 6,965,968 ("the '968  
4 Patent") and U.S. Patent No. 7,418,731 ("the '731 Patent"). On September 18, 2013, the case against  
5 Blue Coat was assigned to the Honorable Edward M. Chen in the San Francisco division (Case No.  
6 4:13-cv-03999, Dkt. No. 14).

7  
8 On September 23, 2013, Finjan filed a lawsuit against Websense, Inc. ("Websense") in this  
9 district (Case No. 4:13-cv-04398), alleging that Websense infringes three of the seven patents asserted  
10 against FireEye in the instant lawsuit, *i.e.*, the '822 Patent, the '633 Patent and the '408 Patent, along  
11 with one additional patent, *i.e.*, U.S. Patent No. 8,141,154 ("the '154 Patent").

12 On September 25, 2013, Finjan filed a Notice of Pendency of Other Action or Proceeding (Dkt.  
13 No. 22). FireEye is currently preparing an Administrative Motion to Consider Whether the Cases  
14 Should Be Related.

#### 15 **11. Relief**

16  
17 Finjan seeks entry of judgment finding that FireEye infringes the Patents-in-Suit, both directly  
18 and indirectly, and that the Patents-in-Suit are valid. Finjan also seeks injunctive relief and monetary  
19 damages, including damages based on a calculation of lost profits or an amount no less than a  
20 reasonable royalty. Finjan further seeks a judgment that this case is exceptional and an award of  
21 Finjan's costs and reasonable attorneys' fees. Finjan also seeks an accounting of all sales and  
22 revenues, together with pre-judgment and post-judgment interest. Finjan seeks any other relief  
23 available under applicable law.  
24

25 FireEye seeks an entry of judgment in its favor and against Finjan on Finjan's claims against  
26 FireEye for patent infringement; a finding that FireEye does not infringe any asserted claims of any of  
27 the Asserted Patents; a finding that the asserted claims of the Asserted Patents are invalid; a finding  
28

that this case is exceptional and entry of an Order directing Finjan to pay FireEye its costs and attorneys' fees; and such other relief as the Court deems just and proper under the circumstances.

## **12. Settlement and ADR**

Pursuant to ADR L.R. 3-5, the parties have reviewed the Court's ADR handbook, discussed the available ADR procedures and considered whether this case would benefit from an ADR procedure. The parties have also met and conferred to select one of the available ADR processes for this case and have chosen the Court's mediation process, to be completed by the presumptive deadline in the local rules, as set forth in their stipulation submitted on September 19, 2013 (Dkt. No. 19) and ordered by the Court on September 23, 2013 (Dkt. No. 20).

## **13. Consent to Magistrate Judge**

The parties do not consent to have a magistrate judge conduct all further proceedings including trial and entry of judgment.

## **14. Other references**

The parties do not believe that this case is suitable for reference to binding arbitration, a special master, or the Judicial Panel on Multidistrict Litigation.

## **15. Narrowing of Issues**

Discovery has just begun, but subject to the progression of discovery, the parties may be able to narrow certain issues via stipulated facts.

In addition, in order to streamline "the issues in this case to promote a 'just, speedy, and inexpensive determination' of this action, as provided by Federal Rule of Civil Procedure 1," the parties provide the following competing proposals regarding the phased limits on asserted claims and prior art references to supplement all other discovery rules and orders:

Not later than 40 days after FireEye is required to produce documents sufficient to show the operation of the accused instrumentalities pursuant to Patent Local Rule 3-4, Finjan shall serve a

1 Preliminary Election of Asserted Claims, which shall assert no more than [Finjan's Proposal: 15  
 2 claims from each patent] [FireEye's Proposal, the Federal Circuit Advisory Council's Model Order  
 3 Limiting Excess Patent Claims (the "Model Order"): 10 claims from each patent and not more than a  
 4 total of 32 claims]. Not later than 14 days after service of the Preliminary Election of Asserted  
 5 Claims, FireEye shall serve a Preliminary Election of Asserted Prior Art, which shall assert no more  
 6 than [Finjan's Proposal: 15 prior art references against each patent] [FireEye's Proposal, the Model  
 7 Order: 12 prior art references against each patent and not more than a total of 40 references].<sup>1</sup>  
 8

9 Not later than 28 days after the Court issues its Claim Construction Order, Finjan shall serve a  
 10 Final Election of Asserted Claims, which shall identify no more than [Finjan's proposal: 10 asserted  
 11 claims per patent from among the 15 previously identified claims] [FireEye's Proposal, the Model  
 12 Order: 5 asserted claims per patent from among the 10 previously identified claims and no more than a  
 13 total of 16 claims]. Not later than 14 days after service of a Final Election of Asserted Claims,  
 14 FireEye shall serve a Final Election of Asserted Prior Art, which shall identify no more than [Finjan's  
 15 Proposal: 10 asserted prior art references per patent from among the 15 prior art references previously  
 16 identified for that particular patent] [FireEye's Proposal, the Model Order: 6 asserted prior art  
 17 references per patent from among the 12 prior art references previously identified for that particular  
 18 patent and no more than a total of 20 references].  
 19

20 Upon a showing of diligence, and with due consideration for prejudice, a party may seek to  
 21 modify the above limits on asserted claims and prior art references for good cause shown. Any  
 22

23 \_\_\_\_\_  
 24 <sup>1</sup> Finjan's Proposal: As explained in greater detail below, with respect to the prior art references that  
 25 FireEye is to identify, any reference associated with a particular prior art instrumentality should be  
 counted toward the number of asserted prior art references.

26 FireEye's Proposal, the Model Order: A prior art instrumentality (such as a device or process) and  
 27 associated references that describe that instrumentality shall count as one reference, as shall the closely  
 28 related work of a single prior artist.

1 request to increase these limits must specifically show why the inclusion of additional asserted claims  
2 or prior art references is warranted. *See In re Katz Interactive Call Processing Patent Litig.*, 639 F.3d  
3 1202, 1312–13 (Fed. Cir. 2011). A failure to seek such a modification will constitute acquiescence to  
4 the above limits on asserted claims and prior art references.

5 The parties and the Court may further narrow the issues during pretrial proceedings in order to  
6 present a manageable case at trial.

7  
8 FireEye’s Statement: FireEye’s proposals follow the phased limits on asserted claims and prior  
9 art references set forth in the recently issued Model Order Limiting Excess Patent Claims. The Model  
10 Order was thoughtfully crafted “[a]fter reviewing existing authority,” “drawing on collective  
11 experience” and unanimously approved by the Federal Circuit Advisory Council, a committee made  
12 up of judges, in-house counsel, patent litigators and professors. On the other hand, Finjan’s proposal  
13 to limit the number of asserted claims does not meaningfully narrow the number of issues in dispute.  
14 Indeed, the sheer number of claims asserted by Finjan is overwhelming. In the First Amended  
15 Complaint, for each of the seven patents-in-suit, Finjan alleges that FireEye directly infringes “one or  
16 more” claims, meaning there are potentially 240 claims at issue. Additionally, Finjan alleges indirect  
17 infringement of a total of 109 claims.<sup>2</sup> Finjan’s proposal on narrowing claims would only narrow this  
18 number to 105 claims at the first juncture and 70 at the second. This number of asserted claims is  
19 excessive, and amounts to no real limitations at all. Finjan claims that it will narrow the number of  
20 claims by the time of the final pretrial conference, but has not added any requirement to its proposal  
21 that would obligate it to do so. On the other hand, FireEye’s proposal, which directly tracks the Model  
22 Order, narrows the number of asserted claims to 32 at the first juncture and 20 at the second.  
23  
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25  
26  
27 <sup>2</sup> Finjan claims that it has not asserted so many claims either directly or indirectly, but does not explain  
28 how this number is wrong or where it has further narrowed the number of asserted claims.

1 FireEye's proposal meaningfully focuses the case to the issues in dispute and will reduce the burden  
2 on the Court and the parties.

3 Finjan's purported "problems" with the Model Order are unfounded. Finjan suggests that the  
4 Model Order has "a number of problems" and may no longer be "approved" for adoption because it  
5 was removed from the Advisory Council page of the Federal Circuit's website. Not so. Rather, after  
6 it was incorrectly reported that the Federal Circuit had adopted the Model Order, the Federal Circuit  
7 decided that Advisory Council approval could give the impression that the Federal Circuit has  
8 sponsored the Model Order. Thus, the Federal Circuit removed the Model Order from its website.  
9 This has no impact on its viability at the district court level, and the Model Order Committee<sup>3</sup>  
10 continues to be the sponsoring entity for the order. (The Model Order Committee includes one of  
11 FireEye's counsel, Sean Cunningham.) The Model Order can be found by members on the Federal  
12 Circuit Bar Association website at:  
13 <https://www.fedcirbar.org/olc/pub/LVFC/cpages/homepage/homepage.jsp> Finjan's further complaint  
14 that the Model Order's limitations on asserted claims and prior art references are not numerically the  
15 same is illogical, because Finjan is attempting to compare apples and oranges. The Model Order  
16 Committee thoughtfully crafted the numerical limitations on asserted claims and prior art references to  
17 by equally proportional for both sides in a given litigation. Indeed, this seven-patent case with  
18 potentially hundreds of asserted claims and prior art references is precisely why the Model Order  
19 exists in the first place. The Court should adopt it in this case.

20  
21 Finjan's Statement: While Finjan agrees in principle to the phased narrowing of asserted  
22 claims and prior art references similar to what is described in the "Model Order," there are a number  
23  
24

25  
26 <sup>3</sup> The Model Order Committee consists of Chief Judge Randall Rader (Federal Circuit), Chief Judge  
27 Leonard Davis (E.D. Tex.), Judge Theodore Essex (ITC), Judge Katherine Forrest (S.D.N.Y.), Judge  
28 Lucy Koh (N.D. Cal.), Tina Chappell, Morgan Chu, Sean Cunningham, Isabella Fu, Mike McKool,  
Edward Reines (Chair), John Whealan.

1 of problems with the “Model Order” (as explained further below), and the appropriate numbers of  
2 claims and references must be determined on a case by case basis. Here, Finjan contends that FireEye  
3 infringes seven (7) patents, such that the limits that FireEye proposes are too low, particularly at the  
4 proposed given points of time. Contrary to FireEye’s suggestion above, Finjan is not currently  
5 asserting 240 claims against FireEye, much less asserting that FireEye is indirectly infringing 109  
6 claims, and Finjan will be identifying particular asserted claims in its infringement contentions per the  
7 Patent Local Rules. Also, Finjan’s proposal provides that the parties have the same numeric  
8 limitations on asserted claims and references, respectively, whereas FireEye’s proposal unfairly allows  
9 FireEye a greater number of prior art references than Finjan is allowed asserted claims. Also, while  
10 the limits Finjan proposes are higher than FireEye’s at the two identified points in time (*i.e.*, after  
11 FireEye’s production regarding its accused technology and after the Court’s claim construction order),  
12 Finjan will further narrow the claims and references by the time of the final pretrial conference.  
13

14         Finjan notes that the “Model Order” that FireEye refers to was only very recently proposed,  
15 and the Federal Circuit posted a notice explaining that neither the Federal Circuit nor its Advisory  
16 Council sponsors or endorses this proposal. [http://www.cafc.uscourts.gov/images/model\\_orders.pdf](http://www.cafc.uscourts.gov/images/model_orders.pdf).  
17 In fact, the Federal Circuit removed this “Model Order” from its website. As indicated above, there  
18 are a number of problems with this proposed “Model Order,” including the fact that it does not  
19 appropriately define “associated references” with a prior art product, permitting an accused infringer  
20 to expand the number of asserted references well beyond the proposed limit. Every reference that  
21 FireEye asserts should be counted as one reference, and each reference associated with an alleged  
22 prior art instrumentality must be identified and counted toward the number of asserted prior art  
23 references. *See Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1351-52 (Fed. Cir.  
24 2008) (dictating that a collection of technical specifications collectively known as the GSM standard,  
25  
26  
27  
28



1 written by different authors at different times do not function as a single prior art reference). FireEye  
2 is not willing to agree to this limitation, highlighting the very issue that the prior art references FireEye  
3 can assert may very well extend well beyond the limits it claims to be proposing.

#### 4 **16. Expedited Schedule**

5 The parties do not propose that this case proceed under the Expedited Trial Procedure of  
6 General Order 64 Attachment A.

#### 7 **17. Scheduling**

8 The parties' scheduling proposals are set forth in the chart attached hereto as Appendix A.

9 Finjan's Statement: Finjan proposes the schedule set forth in the Patent Local Rules without  
10 modification, as set forth in Appendix A. Finjan does not agree that a delay in the schedule in the  
11 instant case based on the lawsuits it has subsequently filed against unrelated defendants Blue Coat and  
12 Websense is appropriate. The accused technology in the Blue Coat and Websense cases that will be  
13 central to the lawsuits and discovery is different than FireEye's accused technology. There are only  
14 two patents common in all three lawsuits, the '633 Patent and the '822 Patent. There are two patents  
15 asserted against Blue Coat, the '780 Patent and the '844 Patent, which are also asserted against  
16 FireEye. There is one patent asserted against Websense, the '408 Patent, which is also asserted against  
17 FireEye. The remaining patents asserted against FireEye, namely the '086 Patent and the '305 Patent,  
18 are not asserted in either the Blue Coat Action or the Websense Action.

19 The three proceedings should not be consolidated. The defendants in the three lawsuits are  
20 unrelated, have different accused technology and have conflicting interests as they are competitors.  
21 Finjan is not aware that FireEye has any business relationships with Blue Coat or Websense, other  
22 than as competitors, such that there cannot be a substantial overlap in the accused technology. While  
23 there are some common patents involved in each of the lawsuits, there are patents only asserted against  
24 FireEye. While consolidation would conserve some resources and assure that there were no conflicting  
25

1 results, there will be no substantial efficiencies gained if the proceedings are consolidated given the  
 2 foregoing and substantial differences between the actions. Moreover, any small benefits gained from  
 3 consolidation do not merit the substantial delay in the schedule proposed by FireEye.

4 FireEye's Statement: FireEye's proposed schedule set forth in Section 17 (Appendix A)  
 5 meaningfully contemplates the consolidation of the related cases recently filed by Finjan for pretrial  
 6 purposes as it tracks the Local Rule deadlines for the most recently filed related case, Case No. 4:13-  
 7 cv-04398. There is a substantial overlap in technology and five of the seven patents asserted against  
 8 FireEye are also asserted in these related cases. As consolidation saves judicial resources and protects  
 9 against inconsistent judgments, Courts routinely consolidate cases under similar circumstances. *See,*  
 10 *e.g., MySpace, Inc. v. Graphon Corp.*, 732 F. Supp. 2d 915, 916 (N.D. Cal. 2010) (stating that two  
 11 cases involving declaratory judgment complaints, filed by two separate plaintiffs for non-infringement  
 12 and invalidity of the same patents owned by the same defendant, were related and consolidated );  
 13 *Encyclopedia Britannica, Inc. v. Magellan Navigation, Inc.*, 512 F. Supp. 2d 1169, 1177 (W.D. Wis.  
 14 2007) ("if this case is not transferred and consolidated there is the risk that the same patents will be  
 15 interpreted differently creating inconsistent claim construction rulings, piecemeal litigation and  
 16 inconsistent judgments").

#### 17 **18. Trial**

18 The parties have requested trial by jury and expect that the trial will require approximately 7  
 19 court days.

#### 20 **19. Disclosure of Non-party Interested Entities or Persons.**

21 The parties have filed Certifications of Interested Entities or Persons pursuant to Civil Local  
 22 Rule 3-16. Dkt. No. 3 (Finjan's certification); Dkt. No. 14 (FireEye's certification).

23 Finjan confirms that it is a wholly owned subsidiary of Finjan Holdings, Inc., and that no other  
 24 entities have a financial interest in the subject matter in controversy in Finjan, or a non-financial  
 25

1 interest in the subject matter of Finjan that could be substantially affected by the outcome of this  
 2 proceeding.

3 FireEye confirms that it does not have any parent corporation and no publicly held corporation  
 4 owns 10% or more of its stock.

## 5 **20. Other Matters**

6 Pursuant to Patent Local Rule 2-1, the parties have also met and conferred regarding the  
 7 following additional matters:

### 8 **(1) Proposed modification of the obligations or deadlines set forth in the Patent Local Rules**

9  
 10 FireEye proposes that the deadlines set forth in the Patent Local Rules should be modified as  
 11 described in FireEye's schedule set forth in Section 17 (Appendix A). Finjan disagrees with FireEye's  
 12 modification. The parties' respective positions regarding the schedule are set forth above at Section  
 13 17.  
 14

### 15 **(2) The scope and timing of any claim construction discovery including disclosure of and discovery from any expert witness permitted by the court**

16  
 17 The parties' proposed schedule (Section 17, Appendix A) addresses the timing of claim  
 18 construction discovery. The parties' respective positions regarding the schedule are set forth above at  
 19 Section 17. At this time, the parties do not anticipate a need to limit the scope of claim construction  
 20 discovery.  
 21

### 22 **(3) The format of the Claim Construction Hearing, including whether the Court will hear live testimony, the order of presentation, and the estimated length of the hearing**

23 The parties note that, pursuant to Judge Armstrong's Patent Standing Orders, "[t]he claim  
 24 construction hearing will generally be scheduled for no longer than three (3) hours" (§11), and the  
 25 parties anticipate requesting at least this amount of time for the hearing. The parties agree that Finjan  
 26 and FireEye will each be allocated half of the total time permitted for the hearing. The parties agree  
 27

1 that the presentations should begin with Finjan's argument regarding all of the disputed claim terms,  
2 followed by FireEye's argument regarding all of the disputed claim terms, followed by any rebuttal by  
3 Finjan. With respect to live testimony, the parties note that Judge Armstrong's Patent Standing Orders  
4 address this issue at paragraph 9. As such, Finjan or FireEye will seek approval pursuant to this  
5 paragraph if either determines that such testimony will be necessary.

6 **(4) How the parties intend to educate the court on the technology at issue**

7 The parties propose providing the Court with a tutorial regarding the technology at issue prior  
8 to the claim construction hearing. The parties further note that Judge Armstrong's Patent Standing  
9 Orders address the format and allotted time for such a tutorial at paragraph 6.  
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1 DATED: September 30, 2013

Respectfully submitted,

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FINJAN, INC.

14 DATED: September 30, 2013

Respectfully submitted,

15 By: /s/ Summer Krause

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FIREEYE, INC.

28 In accordance with Civil Local Rule 5-1(i)(3), I attest that concurrence in the filing of this  
document has been obtained from any other signatory to this document.

By: /s/ James Hannah

James Hannah (State Bar No. 237978)

**CASE MANAGEMENT ORDER**

The above JOINT CASE MANAGEMENT STATEMENT & PROPOSED ORDER is approved as the Case Management Order for this case and the parties shall comply with its provisions.

IT IS SO ORDERED.

Dated: \_\_\_\_\_

UNITED STATES DISTRICT JUDGE

**Appendix A:**  
**Proposed Case Schedule**

<b>Event</b>	<b>Applicable rule or order</b>	<b>Ordered or Agreed Date</b>	<b>Finjan's Proposed Date</b>	<b>FireEye's Proposed Date</b>
Initial Disclosures	Dkt. No. 2; Rule 26(a)(1)		October 10, 2013	October 24, 2013
Initial Case Management Conference	Dkt. No. 7	October 10, 2013		
Disclosure of Asserted Claims and Infringement Contentions; Document Production Accompanying Disclosure	Pat. L.R. 3-1, 3-2 (Not later than 14 days after the Initial Case Management Conference)		October 24, 2013	January 28, 2014
Last day to join parties or amend the pleadings without leave of Court		November 11, 2013		
Invalidity Contentions; Document Production Accompanying Invalidity Contentions	Pat. L.R. 3-3, 3-4 (Not later than 45 days after service upon it of the "Disclosure of Asserted Claims and Infringement Contentions")		December 9, 2013	March 14, 2014
Exchange of Proposed Terms for Construction	Pat. L.R. 4-1 (Not later than 14 days after service of the "Invalidity Contentions" pursuant to Patent L.R. 3-3)		December 23, 2013	March 28, 2014

Event	Applicable rule or order	Ordered or Agreed Date	Finjan's Proposed Date	FireEye's Proposed Date
Exchange of Preliminary Claim Constructions and Extrinsic Evidence	Pat. L.R. 4-2 (Not later than 21 days after the exchange of the lists pursuant to Patent L.R. 4-1)		January 13, 2014	April 18, 2014
Joint Claim Construction and Prehearing Statement.	Pat. L.R. 4-3 (Not later than 60 days after service of the "Invalidity Contentions")		February 7, 2014	May 13, 2014
Completion of Claim Construction Discovery (including depositions of experts who submitted declarations in support of claim construction positions)	Pat. L.R. 4-4 (Not later than 30 days after service and filing of the Joint Claim Construction and Prehearing Statement)		March 10, 2014	June 12, 2014
Claim Construction Briefs – opening brief	Pat. L.R. 4-5(a) (Not later than 45 days after serving and filing the Joint Claim Construction and Prehearing Statement)		March 24, 2014	June 27, 2014
Claim Construction Briefs – responsive brief	Pat. L.R. 4-5(b) (Not later than 14 days after service of an opening brief)		April 7, 2014	July 11, 2014
Claim Construction Briefs – reply brief	Pat. L.R. 4-5(c) (Not later than 7 days after service of a responsive brief)		April 14, 2014	July 18, 2014



Event	Applicable rule or order	Ordered or Agreed Date	Finjan's Proposed Date	FireEye's Proposed Date
Claim Construction Hearing (including technology tutorial).	Pat. L.R. 4-6 (Subject to the convenience of the Court's calendar, two weeks following submission of the reply brief specified in Patent L.R. 4-5(c))		April 28, 2014, subject to the convenience of the Court's calendar	August 1, 2014, subject to the convenience of the Court's calendar
Joint Case Management Status Report	Judge Armstrong's Patent Standing Orders, ¶12	30 days after claim construction order		
Close of fact discovery		To be set after claim construction order		
Opening expert reports		To be set after claim construction order		
Rebuttal expert reports		To be set after claim construction order		
Close of expert discovery		To be set after claim construction order		
Opening summary judgment briefs		To be set after claim construction order		
Responsive summary judgment briefs		To be set after claim construction order		
Reply summary judgment briefs		To be set after claim construction order		

Event	Applicable rule or order	Ordered or Agreed Date	Finjan's Proposed Date	FireEye's Proposed Date
Summary judgment hearings		To be set after claim construction order		
Final Pretrial Conference		To be set after claim construction order		
Trial		To be set after claim construction order		